GOVINDASAMY MUNUSAMY A

v.

INDUSTRIAL COURT MALAYSIA & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN B
HAMID SULTAN ABU BACKER JC
[APPLICATION FOR JUDICIAL REVIEW NO: S25-02-2006]
29 NOVEMBER 2007

LABOUR LAW: *Industrial Court - Judicial review - Certiorari - Constructive dismissal - Transfer of employee to a different entity - Whether purely a matter of management's prerogative - Whether must depend on facts and contract of employment - Mala fide or improper motive* C

This was an application for an order of *certiorari* to quash an award of the Industrial Court dismissing the applicant's claim for unlawful D (constructive) dismissal, and ruling that the second respondent/employer, in seeking to transfer the applicant from Litang Estate in Lahad Datu, Sabah to its parent company Ganda Plantations Sdn Bhd in Teluk Intan, Perak, had merely exercised its implied or inherent right as an employer. Essentially, the applicant alleged that the transfer was *mala fide* since: E (i) the contract of employment did not make any allowance for such transfer; (ii) there was no valid reason therefor; (iii) the transfer had entailed a reduction in remuneration; (iv) Ganda Plantations Sdn Bhd was a different entity altogether from Litang Estate; and (v) the transfer was merely to punish him for his involvement in the company's Association of Agricultural Executives. The learned Chairman of the F Industrial Court admitted that the contract of employment was silent on the issue of transfer, but nonetheless could not find any improper motive for the second respondent's decision. Before the learned Judicial Commissioner, the primary issue that arose was whether the findings by the learned Chairman could be sustained on the facts and in the G circumstances of this case.

Held (quashing award and ordering backwages and compensation):

(1) It is true that the Court of Appeal in *Ladang Holyrood v. Ayasamay Manickam & 16 Ors* had decided that transfer is the prerogative or H implied right of the employer, so long as it is not actuated by *mala fide* or improper motive. The Court of Appeal was however dealing with departmental transfers and not transfers relating to one employer to another. In any case, in this time and era, I do not think that any proposition to say that the right of transfer of an I employee to a different entity being a prerogative right of the management will be upheld in toto. It all depends on the facts and

A the contract of employment. On the facts of this case, the terms of contract do not expressly or impliedly say that. It is clear from the letter dated 14 September 1989 that the applicant accepted the offer to the post of Acting Manager of Litang Estate, Lahad Datu, Sabah and not some other legal entity in West Malaysia. On this issue, B the learned Chairman had clearly erred. (para 8)

(2) It is totally abhorrent to the notion of justice and fair play for the respondent to lead evidence to show that the additional remuneration of RM550 stated in the letter of offer was in respect of hardship allowance when the contract *prima facie* was for a job in Sabah. C Hardship allowance is usually given to workers who are transferred from West Malaysia to Sabah and not otherwise. In consequence, the learned Chairman was in error when he concluded that the claimant's allegation that he would receive less income upon transfer is not a valid reason to establish *mala fide*. (para 8)

D

(3) The learned Chairman too, in concluding that there was no *mala fide* in the transfer and the reduction in remuneration, had failed to take due weight of the fact that the second respondent, as evidenced by the letter dated 1 November 1993, did not want the service of E the applicant. This letter, read with the agent's letter dated 4 November 1993 and the second respondent's transfer letter dated 18 December 1993, showed that the transfer *per se* was not *bona fide*, but with a view to eliminate the applicant from the service of the second respondent by transferring him to a different entity which was not part of the contractual term. (paras 9 & 10)

F

(4) There was merit in the applicant's application and an order of *certiorari* to quash the award must therefore be allowed. Further, this is a fit and proper case to order compensation *in lieu* of reinstatement, and in the circumstances, the matter is remitted to the G Industrial Court for assessment of back wages and compensation *in lieu* of reinstatement. (paras 11 & 12)

Case(s) referred to:

Barat Estates Sdn Bhd & Anor v. Parawakan Subramaniam & Ors [2000] 3 CLJ 625 CA ***(refd)***

H *Chiong Wee Chiok v. Barau Anak Laja & Anor [2007] 1 LNS 547 HC* ***(refd)***

Jowharlal Nehru University v. Dr KS Jawatkar & Ors [1989] 2 LLJ 586 ***(refd)***

Ladang Holyrood v. Ayasamy Manikam & Ors [2004] 2 CLJ 697 CA ***(refd)***

Manager, Ms Pyarchand Kesarimal Porwal Bidi Factory v. Onkar Laxman Theng & Ors [1970] 20 ELR 140 ***(refd)***

Nokes v. Doncaster Amalgamated Collieries, Ltd HCJ [1940] 3 All ER 549 ***(refd)***

I *Rosneli Kundor v. Kelantan State Economic Development Corporation [1997] 3 CLJ Supp 470 HC* ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2

For the applicant - Sukumaran Vanugopal; M/s S Vanugopal & Partners Advocates
For the respondents - Edwin Tsen Thau Bing; M/s Tang Pang Tsen & Co Advocates

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the judicial review application in respect of the award of the Industrial Court seeking *inter alia* the following:

(i) The transfer of the applicant by the 2nd respondent to another entity, Ganda Plantations Sdn. Bhd. with effect from 1st January 1994 and with a reduction in the applicant's total remuneration constituted a dismissal of the applicant without just cause or excuse and/or was an unfair labour practice and/or unlawful or was victimization be upheld and affirmed;

(ii) That the 1st and/or the 2nd respondent be accordingly directed to reinstate the applicant to his former position or equivalent position in the 2nd respondent without any loss of wages, allowance, service, seniority privileges or benefits of any kind and/or any other alternate relief as shall be deemed fit and proper; and

(iii) That all necessary and consequential directions and/or other orders, as the case may be, be given.

[2] The respondent at the commencement of the hearing as a preliminary issue says that the applicant did not in his notice of hearing apply for an order for *certiorari* to quash the award of the Industrial Court and in consequence an order for *certiorari* ought not to be considered. I do not see any merit in such a line of argument as the leave application and notice of hearing must be read together. Further, any preliminary objection purely on technicalities ought not to be entertained more so when there is no formal application to do so, pursuant to O. 2 of RHC 1980. I have dealt with this area of procedural law in detail in the case of Sibu High Court Civ-App-12-8-2007 *Chiong Wee Chiok v. Barau Anak Laja & Anor* [2007] 1 LNS 547 and the relevant part reads as follows:

A The only issue for me to decide is whether various provisions of the rules of procedure relied on by the respondents is mandatory. The law in this area is well settled. A rule of procedure is only mandatory when the law in positive terms say that or can be implied as a condition precedent in the cause of proceedings, otherwise any omission to comply with the rules may be condoned by the courts pursuant to
B various provisions of rules of courts as well as inherent jurisdiction of court. (See O. 2 SCR 1980; *Megat Najmuddin Bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd.*). Support for the proposition stated above can be garnered from a number of cases, and rules of procedure. Legal Practitioners often say that the distinction between 'mandatory' and 'directory' rules is largely a matter of judicial taste.
C There are many judicial decisions which will support this proposition. For example, the courts in interpreting Order 32 rule 13(2) of the RHC 1980 have held that it is a strict requirement that any affidavit filed in support of an application must be filed and served on the other party within 14 days. (See *Malayan Banking Berhad v. Lim Tee Yong & 3 Ors* [1994] 4 CLJ 558). However, the Court of Appeal in *Perbadanan*
D *National Insurans Sdn. Bhd v. Pu Lai Ong* [1996] 3 AMR 2869 did not give a mandatory interpretation to the said rule. The importance of observing procedural law is essential to attain substantive justice and early disposal of the case. However, any form of predatory instinct to use procedural law as a sword to dispose of a case without merits
E being heard will in truth lead to miscarriage of justice. Such a result must be avoided at all costs to ensure that the legitimate expectations of the litigant who has been embedded with the notion that the fulcrum of justice will be met by judges by ensuring that merit of the case will be heard further. The doctrine of legitimate expectation requires an adjudicator to act fairly and has become integral part of
F natural justice. (See *Union of India v. Hindustan Development Corp AIR* [1994] SC 988). Many Malaysians cases has adopted this doctrine. (See *Ahmad Tajuddin Bin Haji Ishak v. Suruhanjaya Pelabuhan Pulau Pinang C.A.* [1997] 1 MLJ 241; *Lee Freddie & Ors. v. Majlis Perbandaran Petaling Jaya & Anor.* [1994] 3 MLJ 640).

G For reasons stated above I dismiss the preliminary objection.

Brief Facts

[3] The applicant was employed by the 2nd respondent on the following terms which reads as follows:

H

> Dear Sir,
>
> We refer to your application dated 18th August, 1989 for a planting position and are pleased to offer you the post of acting manager of Litang Estate, Lahad Datu, Sabah.

I

> Your emoluments will be:

Basic Salary	$2,200
Additional Remuneration	550
E.P.F.	330
	$3,080

You will serve a probationary period of six months and on completion of this period, if you are found to be suitable, you will be confirmed as acting manager.

During the probationary period, the company shall have the right to terminate your employment by serving you one month's notice or pay you one month's pay *in lieu* and *vice-versa*.

You will be entitled to three weeks leave per annum following the completion of each year of service. You will also be entitled to one single passage to Kuala Lumpur per annum.

The above offer is subject your passing a medical examination to be conducted by a private practitioner and request the doctor to submit the report to us before the 18th September, 1989.

You are required to commence work on Litang Estate on 18th September, 1989.

If you accept this offer of employment, kindly sign and return the duplicate copy of this letter to us as soon as possible.

On 18 December 1993 the applicant was notified by the respondent company that he was transferred to Ganda Plantations Sdn. Bhd. ("GPSB"). Being dissatisfied with the said transfer because GPSB was outside the respondent company's group or organization, the applicant wrote to the respondent company on 22 December 1993 protesting against the transfer. In the same letter, the applicant gave due notice of ten days that he be relieved with effect from 31 December 1993. As the respondent company failed to withdraw the applicant's notice of transfer by 31 December 1993, the applicant walked out of his employment based on the said letter.

[4] The letter of protest by the applicant stated above sets out the full grievance and reads as follows:

Dear Sir,

Re: Transfer

Your letter dated 18/12/93 refers. I regret and disappointed with your transfer order for the following reasons:

1) I consider the transfer was a punishment for my active involvement in the association of Agricultural Executive which

A has applied for Registration under the Trade Unions Act 1959 and it is done with *mala fide* intention.

2) There are no reasons given for the transfer.

3) My income will affected / reduced. I am paid additional
B remuneration and not hardship allowance.

4) I am appointed for LBSB, Litang Estate. PBSB and GPSB different entities.

5) Your letter to PASB has relevance to this transfer.

C 6) The appointment letter has no clause on transfer.

Therefore I am unable to accept you transfer but hereby I resign and consider I am constructively dismissed with the right for legal redress. I will be leaving the estate on 31/12/93.

D **The law**

[5] To succeed in a case of constructive dismissal, it is sufficient for the claimant to establish that:

(i) the company has by its conduct breached the contract of
E employment in respect of one or more of the essential terms of the contract;

(ii) the breach is a fundamental one going to the root or foundation of the contract;

F (iii) the claimant had placed the company on sufficient notice period giving time for the company to remedy the defect;

(iv) if the company, despite being given sufficient notice period, does not remedy the defect then the claimant is entitled to terminate the
G contract by reason of the company's conduct and the conduct is sufficiently serious to entitle the claimant to leave at once; and

(v) the claimant, in order to assert his right to treat himself as discharged, left soon after the breach.

H **[6]** The test for constructive dismissal as it stands is a test on contractual breach rather than unreasonableness. Further, where the workman's claim for reinstatement is based on constructive and not actual dismissal, the onus of proving that he has been constructively dismissed lies on the workmen himself.

I

[7] To decide the fate of the application, it is incumbent to decide whether on the facts of this case, the employee can be transferred as of right from Sabah to Teluk Intan, Perak. The other point of consideration is if the transfer is valid, whether there can be a diminution in the emoluments to be paid to the applicant.

Transfer to Teluk Intan

[8] The learned Chairman says that "it is well established in industrial law that the right to transfer an employee from one department to another or from one branch to another or from one company to another within the organization is the prerogative of the management and the Industrial Court will not interfere unless the transfer is actuated with improper motive. Whether a transfer entails a change to the detriment of a workman in regard to his terms of employment or whether the transfer is *bona fide* is a question of fact for the court to determine.

The learned Chairman relies on two treatises and that part of the award read as follows:

> The principle is that although the claimant's contract of employment is silent on transfer the company still has an implied and/or inherent right to transfer especially where as in this case the claimant is being transferred to its parent company. Alfred Arins in his treatise 'Employees Misconduct' addressed the issue of an implied and/or inherent right to transfer in the following terms:
>
> > The large majority of reported cases concerning transfer are Indian, and they have uniformly held that where an employer has several branches in different cities and nothing is stated in the contract of service regarding transfer, the employer's right to do is implied ... .
>
> On page 243 last para Alfred Arins wrote:
>
> > In one case where an employee's contract said, 'Your headquarters will be Madras' the Madras Labour Court held that this did not mean that the employee could not be transferred. The Court constructed this language as merely meaning that 'you will for the present work in Madras'.
>
> The Court concluded:
>
> > The liability to be transferred from one place to another by the employer is an implied condition of service of every employee. It can only be taken away, curtailed, or regulated in express terms... Therefore, unless the terms of employment provide otherwise the company has the right to transfer and it is really for the employee to show that there was a contracting out of this position.

Similarly, CP Mills in his book *Industrial Disputes Law in Malaysia* acknowledged the right to transfer an employee from one job to another. He wrote at page 75 of his book as follows:

> It is well settled that, normally, the right to transfer an employee from one place to another is the prerogative of the management and an employer is entitled to require his employee to work anywhere.

Both the views of Alred Arins and CP Mills were positively endorsed by the High Court in *Tan Cheng Hing v. Federal Metal Printing Sdn. Bhd. & Anor* [1999] 3 MLJ 564 and by the Industrial Court in *Regal Transport Co. Sdn. Bhd. Ipoh v. Transport Worker's Union* [1987] 2 ILR 247a.

I am aware that the Court of Appeal in the case of *Ladang Holyrood* [2004] 3 MLJ 339 has decided that transfer is the prerogative or implied right of the employer, so long as it is not actuated by *mala fides* or improper motive. The Court of Appeal was dealing with departmental transfers and not transfers relating to one employer to another.

I do not think that in this time and era, any proposition to say that the right of transfer of an employee to a different entity being a prerogative right of the management will be upheld in toto. It all depends on the facts and the contract of employment. On the facts of this case, the terms of contract does not expressly and/or impliedly say that. It is clear from the letter dated 14 September 1989 that the employee accepted the offer to the post of acting manager of Litang Estate, Lahad Datu, Sabah and not some other legal entity in West Malaysia. On this issue, I take the view that the learned Chairman has erred. Support for my views can be garnered from the following cases:

(i) *Nokes v. Doncaster Amalgamated Collieries, Ltd. H.C.J.* [1940] 3 All ER 549;

(ii) *Ladang Holyrood v. Ayasamy a/l Manikam & 16 Ors* [2004] 2 CLJ 697 CA;

(iii) *Barat Estates Sdn. Bhd. & Anor v. Parawakan a/l Subramaniam & Ors.* [2000] 3 CLJ 625 CA;

(iv) *Rosneli Kundor v. Kelantan State Economic Development Corporation* [1997] 3 CLJ Supp 470;

(v) *Manager, Ms Pyarchand Kesarimal Porwal Bidi Factory v. Onkar Laxman Theng & Ors.* [1970] 20 ELR 140; and

(vi) *Jowharlal Nehru University v. Dr. K.S. Jawatkar and Others* [1989] 2 LLJ 586.

In the Editorial note in *Nokes* case *(supra)* the learned editor says as follow:

> It is a general rule that contracts of personal service contemplate that the person employed has been selected with reference to his individual skill, competency or other qualification, and it is therefore, of the essence of the contract that the contracting party is entitled to personal performance, and, in default thereof, is entitled to treat the contract as at an end. By reason of this rule, it has been said that contracts of personal service are not assignable, and it is here held that the assignment of contracts of personal service is not included in a general assignment of all the property of a company about to be dissolve to a new company formed for the purpose of taking over the business of that company.

Even if I am wrong on this issue, I take the view that it is totally abhorrent to notion of justice and fair play for the respondent to lead evidence to show that the additional remuneration of RM550 stated in the letter of offer was in respect of hardship allowance when the contract *prima facie* was for a job in Sabah. Hardship allowance is usually given to workers who are transferred from West Malaysia to Sabah and not otherwise. The applicant was never employed in West Malaysia. The contract of employment did not say that the RM550 was for hardship allowance. In consequence, the learned Chairman was in error when he concluded that the claimant's allegation that he would receive less income upon transfer is not a valid reason to establish *mala fide*.

Mala fide

[9] On the issue of *mala fide*, it was the conclusion of the learned Chairman that there was no *mala fide* in the transfer as well as the reduction of remuneration, without taking due weight of the following facts.

(i) The 2nd respondent did not want the service of the applicant. This is evidenced by a letter dated 1 November 1993 by the 2nd respondent to the recruiting agent to take back the applicant on the ground that his services were no longer needed by the company. The letter reads as follows:

A Litang Plantation Sdn. Bhd.
TOP FLOOR, WISMA GANDA, 32000 SITIAWAN, PERAK

1 November 1993

Plantation Agencies Sdn. Bhd.
B Standard Chartered Bank Chambers
Beach Street,
10300 Penang.

Dear Sirs,

C **Re: Mr. M Govindasamy**

We wrote to inform you that the service of the abovementioned in our estate is no longer required. We hereby request that you take him back on or before 31st January 1994.

D We thank you once again for allowing Mr. M. Govindasamy to serve in our estate in the past few years.

Yours faithfully,
Litang Plantation Sdn. Bhd.

E The agent by a letter dated 4 November 1993 informed the 2nd respondent that the applicant is in the employment of the 2nd respondent and they have to deal directly. The said letter states as follows:

Litang Plantation Sdn. Bhd.,

F Box 500,
9th Floor, Wisma Central,
Jalan Ampang,
50450 Kuala Lumpur.

Attn: Mr. Ngan Ching Wen

G Dear Sir,

Mr. M. Govindasamy

We refer to your letter of 1st November 1993 and advise that the above named was recruited as a manager on behalf of Litang Plantation Sdn. Bhd. (LPSB when PASB was appointed as managing
H agents for LPSB in April 1990. In other words, Mr. Govindasamy is a employee of LPSB and consequently LPSB will have to deal directly with the employee concerning the termination of his services.

We trust the above explanation clarify our position.

I Yours faithfully,
PLANTATION AGENCIES SDN BERHAD

Only after the above episode did the 2nd respondent write the letter of transfer dated 18 December 1993 which reads as follows:

> Lahad Datu
>
> Sabah.
>
> Dear Sir,
>
> We write to inform you that Mr Yeap Cheok Khoon will take over from you as the Manager of Litang Plantations Sdn Bhd effective from 22nd instant. You are required to hand over all the documents and correspondence fles etc. of the company to Mr. Yeap. Immediately after the handover, you can take your annual leave until 31st December, 1993.
>
> Your new posting will be in Teluk Intan. You are required to report for duty on 2nd January, 1994. Your immediate superior is Mr.goh Keng Seng, the Chief Executive Officer of Ganda Plantations Sdn. Bhd. All other terms and conditions of service will remain unchanged except the hardship allowance will be withdrawn as the same is only applicable for those who are working in Sabah estate.
>
> Yours sincerely,
> Litang Plantations Sdn. Bhd.

[10] From the reading of the above three letters, it is not difficult to fathom that the transfer *per se* was not *bona fide*, but with a view to eliminate the applicant from the service of the 2nd respondent by transferring him to a different entity which was not part of the contractual term.

[11] I take the view that the application of the applicant has merits, and order of *certiorari* to quash the award must be allowed. Further, I take the view that it is not appropriate to order for reinstatement. This is a fit and proper case to order compensation *in lieu* of reinstatement.

[12] For reasons stated above, the applicants' application is allowed with costs. The getting up fees shall not exceed RM20,000. If costs cannot be agreed, the applicant is at liberty to tax the costs. Further, it is hereby ordered that the matter be referred back to the Industrial Court for assessment of back wages and compensation *in lieu* of reinstatement.